NO. 89-1390

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

In the Matter of the Claim for COMPENSATION UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

THE LOUISIANA INSURANCE GUARANTY ASSOCIATION
Petitioners,

versus

NEIL ABBOTT, JR.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX VOLUME II

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TABLE OF CONTENTS

Page

APPENDIX D A-71

APPENDIX E A-128

APPENDIX D

BEFORE THE
U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of: NEIL ABBOTT, JR. Claimant v. UNIVERSAL IRON WORKS, INC. Employer and LOUISIANA INSURANCE GUARANTY ASSOCIATION Carrier	Case No: 87-LHC-22 OWCP No. 7-89268

Pages: 1-62
Place: Metairie, La.
Date: September 10, 1987

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BEFORE THE U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

In the Matter of:	*	
NEIL ABBOTT, JR.	*	
Claimant	*	
v.	*	
UNIVERSAL IRON WORKS, INCCORPORATED,	*	
Employer	*	Case No. 87-LHC-22
	*	OWCP No. 7-89268
and	*	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	*	
Carrier	*	

Courtroom, Suite 530
Heritage Plaza Building
111 Veterans Boulevard
Metairie, Louisiana

Thursday,
September 10, 1987

Pursuant to Notice, the above-entitled matter came on for hearing at 9:00 a.m.

BEFORE:

The Honorable BEN H. WALLEY,
Administrative Law Judge

APPEARANCES:

On Behalf of Claimant:

DAVID B. ALLEN, ESQ.
525 Park Avenue
Houma, Louisiana 70364

On Behalf of Employer/Carrier:

CHRISTOPHER KOSCIUK, ESQ.
Suite 801, 3445 N. Causeway Boulevard
Metairie, Louisiana 70002

CONTENTS

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Neil Abbott	24	--	--	--
Jennifer Palmer	52	--	--	--

EXHIBIT	FOR IDENTIFICATION	IN EVIDENCE
ALJ	18	18
ALJ-2	18	18
ALJ-3	19	19
ALJ-4	19	19
ALJ-4	19	19
ALJ-5	21	21
ALJ-6	62	62
C-1	32	32
C-2	32	32

EXHIBIT	FOR IDENTIFICATION	IN EVIDENCE
C-3	32	32
C-4	33	33
C-5	43	43
C-6	44	44
C-7	58	58
C-8	58	58
C-9	58	58

P R O C E E D I N G S

JUDGE WALLEY: Let's go on the record. This is a hearing of a claim for compensation benefits under the Longshoreman and Harborworkers Compensation Act, 33 USC Section 901 and following in the case of Neil Abbott, Jr. against Universal Iron Works, Incorporated as an Employer, and now by recent identification, Louisiana Insurance Guaranty Association. The correct style and number of this case as I have read it has been furnished to the reporter, and it would appear in the transcript of this proceeding.

I'm Ben H. Walley, Administrative Law Judge that's been assigned the responsibility to conduct this hearing, to take such actions prior to the hearing as is proper in the premises, to dispose of pending matters, and to receive such evidence as is properly submitted in the case, and to ultimately write a decision and order in the case. I have in my possession the record to indicate that several notices have been given and reschedules and cancels of this hearing, and new parties identified, so we're going to take them up. But I'm going to ask counsel that are now present to identify themselves and the client that they speak for,

and we'll start with the Claimant.

MR. ALLEN: Good morning, Your Honor, May it please the Court, my name is David B. Allen, and I represent Neil Abbott, Jr. in this matter.

JUDGE WALLEY: Furnish your address to the reporter that we may reach you. You can do that separately. And for the Respondent?

MR. KOSCIUK: Your Honor, may I remain seated to stay close to the microphone?

JUDGE WALLEY: Yeah, you can.

MR. KOSCIUK: Thank you, sir. Christopher Kosciuk of the law firm of Bailey & Leininger, 3445 North Causeway Boulevard, Metairie, Louisiana. Phone number 833-8241. Here this morning, Your Honor, on behalf of the Louisiana and Guaranty Association.

JUDGE WALLEY: Very Well. There are several matters that will be addressed, but first take up the motion which has been the subject of some exchange by telephone and conferences. We'll ask the Respondent here to present his position.

MR. KOSCIUK: Your Honor, on behalf of the Louisiana Guaranty Association, our law firm has filed a motion to continue this hearing, and as we discussed last Friday, I believe, alternatively to sever the claims against LIGA. The motion is premised both — it addresses both the Court's discretionary function because we feel that we have demonstrated to the Court that the questions of obligation on behalf of LIGA are complex both factually and legally, and that in view of the fact that LIGA was

only added as a party to this case on July 13, 1987, and that a hearing was assigned for today, September 10, 1987, that there was insufficient time for LIGA to address these complex legal and factual issues such that, respectfully, Your Honor, in the discretion of this Court a continuance should be granted so that discovery can proceed in proper fashion, and LIGA be provided an opportunity to defend itself.

The second leg of the motion which we filed, however, is based on facts which we feel we have placed in evidence before the Court via the affidavit of Judith Atkinson which establishes, we feel, Your Honor, that the notice which was sent to Miss Atkinson, or Ms. Atkinson adding LIGA as a party to this case, and at the same time, setting the matter for hearing was, in fact, never received. So that we have a situation here where there was no notice provided to LIGA of the fact that it had a hearing scheduled for today. The only way we became aware of the fact that the hearing was scheduled was when Mr. Allen had the courtesy to contact our office approximately a week before the trial date to discuss the possibility of reaching stipulations. And lo and behold, we were very surprised to find out that a hearing had been assigned.

Now, as part of the circumstance to that, it is — the Court should be aware of the fact that at approximately the same time the matter was being assigned a hearing date and LIGA was being formally added as a party, the LIGA appointed counsel, our office in New Orleans, to represent them in lieu of Ms. Atkinson's firm. And certainly there's no question that our firm never received notice, but that's really not the issue here. I think the issue on the right to a continuance as a matter of right is based on the fact that Ms. Atkinson has come before the Court in the form of an affidavit and has, I think, explained very well the fact that

she did not receive notice, and that their firm has adequate safeguards to ensure that any notices which come into their office are, in fact, posted on the calendar.

Your Honor, other than the lack of notice though, I do wish to emphasize the discretionary function involved in this request, because the question of LIGA involvement rests on a so-called "cut through endorsement", which has been addressed only one time by Louisiana intermediate level court, and we feel not in a substantive fashion. If this issue is going to be decided by this Court, we feel that LIGA must be afforded an opportunity to develop all the evidence that's appropriate and necessary to show that the cut through endorsement violated the requirements of the Louisiana statutes establishing the guaranty fund. There were not assessments paid for the obligation that LIGA is now being asked to assume, and we have reason to believe that this involves a class of cases. In other words, there is more than one cut through endorsement floating out there, and LIGA may go — if LIGA isn't afforded an opportunity to present a proper defense, it may find itself with a whole class of cases where it's in very serious financial jeopardy.

I'll rest at this point, Your Honor, and respond to any questions that you have.

JUDGE WALLEY: I'll listen to counsel Claimant first. I suppose you have — do you have any opposition to what the gentleman has said?

MR. ALLEN: I do have opposition in regard to the continuance as requested by counsel. I think the notice that this Court sent out in which the Guaranty Association was added as a party, and also scheduling this particular hearing date shows that it was mailed to Judith Atkinson's firm. The address that the notice was sent to is indeed

the address that is on the letterhead of Mrs. Atkinson's firm.

I can't dispute the fact that Mrs. Atkinson asserts that her firm did not receive notice. In that regard, I do not have opposition to a severance of this claim as it lies against LIGA, and allow us to go forward with our claim against Universal Iron Works at this point. I think that it may be that the special fund will honor the judgment of this Court in that Western Preferred is in liquidation, as is Universal. We can make an argument to that point that the special fund should pay Mr. Abbott funds based upon that evidence. In the alternative, we can pursue the LIGA at a later date to allow them to develop what testimony and evidence they feel appropriate.

JUDGE WALLEY: Very well. I have some questions that might enlighten. At least I hope it enlightens me some.

Counsel, in your presentation of your position, you do not rely on — shall we say heavily, on the fact that notice did not arrive, or that you did not have some notice. You do have some inadequate notice here, that you have certainly pointed out. Are you in a position to either accept the fact that you're in court because of notice of a hearing, although not timely for preparation for the hearing? You have received some notice of this hearing, naturally.

Do you appear just specially to move to continue, or do you accept the fact that you are here with notice? I'm fixing to take the next step. I just want to know what position you're taking, or am I to take the records and see from the facts of this how I can put in the record some delineations of these things?

MR. KOSCIUK: Your Honor, as I indicated, the notice we received came informally from opposing counsel approximately one week before the hearing. We are not in a position to address the merits of the claim against LIGA, or the merits of the claim against the Claimant this morning. There is simply, you know, one week of time to subpoena witnesses and to conclude the discovery in a very complex case.

Our firm has been very active, Your Honor, in handling this case since it was assigned to us. We have got over an inch thick of research materials now on the re-insurance issues —

JUDGE WALLEY: Let's get down to some more specifics, now. We're talking about facts. Are you talking about the facts of your liability through the cut through decisions here and the legal aspects of this claim, or facts about whether or not the Claimant got injured on the job with somebody who cannot now respond for himself?

MR. KOSCIUK: Your Honor, we have focused our attention primarily on the questions of the cut through endorsement and factual questions that may exist as to whether another company, American Excess, may have assumed some obligations, vis-a-vis the Western Preferred Insurance Company and the Early American Insurance Company, such that there would be, in addition to the legal arguments based on the cut through endorsement, and the facts based on the cut through endorsement, there would be legal arguments that LIGA could offer, and factual arguments, with respect to the underlying assumption of obligation by another viable insurance carrier.

We have not even begun to address the merits of Mr. Abbott's claim to compensation in the first instance. We

are not in the position today to address that in any way, shape or form, and I did check the administrative —

JUDGE WALLEY: Wait a minute. Do you feel that you have now, or that you will have under the law eventually have or continue to have a right to question, once your determinations of liability through the contractual chain between the Employer and LIGA, regardless of the facts in that bracket. Do you now claim that you would have a right, ultimately, to go back and challenge the determination of his eligibility for benefits based upon the fact of his employment?

MR. KOSCIUK: Respectfully, Your Honor, I think that would be a matter for you to decide under the existing juris prudence. I believe an argument can be made either way. Number one, the plaintiff is provided an opportunity to proceed this morning, and that may well be arguably dispositive of the issue on the merits of the claim. On the other hand, I would not be perfectly candid if I said that there are some legal questions that might have to be raised if, and only if, Your Honor, it's decided that this claim should have been challenged on the merits.

From what I've heard from Mr. Allen about the case and the fact that Mr. Abbott is presently engaged in a rehabilitation program at Nicholls State University, that may well not be, from a strategical point or tactical point, the area of the case that LIGA would like to focus on.

JUDGE WALLEY: That's the reason I'm very interested in allowing the Claimant a right. I cannot give him anything, you see. I cannot award him anything except determine that he's entitled to benefits and how much. That's the processes of the law.

MR. KOSCIUK: Yes, sir.

JUDGE WALLEY: And that's a factual situation that he's got to produce before he's entitled. But he cannot get relief from anybody until he establishes that right.

MR. KOSCIUK: And I will say, Your Honor, that I have discussed this with Mr. Allen, and that the best decision, the best resolution that we can suggest to the Court is to sever the claims against LIGA to present Mr. Abbott an opportunity to prove factually that he is entitled to compensation, and then to pursue remedies under Section 918 of the Act against the special fund. And then LIGA — in fairness to LIGA, it will have opportunity to then develop its case in due course, and submit it.

JUDGE WALLEY: Well, I'm interested in, before I go any further, in asking if you have the authority to make a decision to this point. So I will have to move from there.

Presently, I think I'm going to allow this gentleman to establish his rights to benefits if he has any. He has to establish them.

MR. KOSCIUK: Yes, sir.

JUDGE WALLEY: And as far as I'm concerned, the law requires that I establish — I give him the right to establish them against an employer.

MR. KOSCIUK: Yes, sir.

JUDGE WALLEY: Now this employer, according to the best information available, is defunct by matter of law. That doesn't keep him from having the right to let the world know that he was working on a job within the

jurisdiction of this court, and had sustained some injury, and has some rights to benefits by that fault.

Now the fact that it's defunct, that gets into a contractual situation between the Employer and whether or not he had insurance. I have no authority to dismiss anybody. That's a contractual situation not before me, and I'm not going to renew a bunch of contracts this morning, or any other morning, to see who is ultimately liable. That's not my responsibility.

Now, do you have the authority to tell us that we can go ahead and establish factually his rights to benefits, if he has any?

MR. KOSCIUK: Your Honor, the only think I can say is that LIGA is not in a position this morning to oppose Mr. Abbott's right to benefits. That's not to say that the basis may not exist to oppose his rights to benefits. At this point, our permanent position is that, in fact, LIGA is not even a party to this case, because it did not receive proper notice of the fact that it was added as a party.

JUDGE WALLEY: If you want to stand on that —

MR. KOSCIUK: I can't stipulate. If you're asking me to stipulate, Your Honor, that this hearing can decide as to LIGA this man's entitlement as to benefits, I cannot stipulate that this hearing can have that function as to LIGA. I believe that's a legal decision that would have to be made by the Court in light of the existing juris prudence, and we would simply rest on that point. I can't stipulate to it.

JUDGE WALLEY: You stop there and I'll move, if you're going to rest on that point. I'll move on that point.

Let the record show that the motion has been presented, and counsel has stated his position that he cannot legally assume, or to accept the fact that they can allow Claimant the right to establish his claim to benefits against a defunct employer —

MR. KOSCIUK: Oh, we can stipulate to that, Your Honor, I'm sorry.

JUDGE WALLEY: — unless they have a right to later challenge that fact, whether he was entitled to benefits.

MR. KOSCIUK: I think there's the questions here, Your Honor, as to the Employer. I think there is no basis on which the Employer can oppose this hearing proceeding, and I think Mr. Abbott is entitled to a definitive judgment against the Employer. And on behalf of LIGA, we can agree that the Court can proceed in that fashion.

Whether LIGA, as a separate party, has any defenses that it can then offer in those circumstances, as we said, it's a legal question. And I have no problem with the Court rendering a definitive judgment against the Employer this morning.

JUDGE WALLEY: I'm going to let the record show, then, that I do not claim, and I will not proceed on the basis that the Louisiana Insurance Guaranty Association has been served with process a sufficient time to require them to participate in this hearing, but that I do assume that with their appearance to present their position, and the statement made that they have no present knowledge of their right to challenge the gentleman's proceedings to establish benefits against his Employer, that they are in court for future, if any, scheduled settings of

this case. But I'm going to travel on the basis — make it a decision as a matter of law this morning, that by their failure to participate in this, or to insist that they're not in court, and I am going to presume that they will have no authority to challenge a factual determination of his rights to benefits against the Employer.

What counsel has told us is controversies, if any, that exist between his client and the preceding chain of alleged liable parties. That does not enter into the field of this man's eligibility for benefits. It may very vitally affect his rights to get benefit from LIGA.

MR. KOSCIUK: If I can be perfectly clear, Your Honor, I do believe that in my presentation this morning, that amongst the discretionary arguments I advanced was also the argument as to a continuance as of right, and that argument was primarily based on the fact that there was not proper notice, formal notice to LIGA, and I believe I have raised, as a legal question, whether or not LIGA is, in fact, here as a party having received notice of this hearing. And as I understand, the Court has ruled against me on that legal point, and I have no recourse but to, you know, accept the Court's ruling at this point. but I do want to make it clear in the record that I have raised as an issue —

JUDGE WALLEY: Well, if we're going to keep that viable as an issue, then, I'm going to go through the record and state the record's references to tie previous attorneys for LIGA into this file, and I'm not responsible for them changing attorneys. If we can't work on that basis, then we'll have to work on the record.

Counsel, do you have correspondence that you can offer into evidence here that you've been in contact with previous counsel for LIGA?

MR. ALLEN: Yes, Your Honor, I do.

JUDGE WALLEY: Would you identify that? Mark it if you will, copies and exhibits into the record.

MR. ALLEN: Yes, Your Honor. the first correspondence that I have in my file which I forwarded the Western Preferred Casualty Policy, along with the copy of the deposition and all medical reports to Judith Atkinson with the firm of Matthew, Atkinson and Guglielmo was July 27th, 1987. I have a carbon copy of my letter. How would you like me to mark that, Your Honor?

JUDGE WALLEY: Mark it as — let me mark it. I'll mark it as ALJ No. 1. We'll make copies of it. On the motion for —

> (The above-described documents were marked as ALJ Exhibit No. 1 for indentification and received in evidence.)

MR. ALLEN: The second correspondence that I have, Your Honor, is on the letterhead of Matthews, Atkinson, Guglielmo, Marks and Day. It is a letter from Judith R. Atkinson dated August 11, 1987 acknowledging receipt of my letter of July 27, 1987, and indicating that Chris Kosciuk with Bailey & Leininger would be counsel of record for LIGA from this portfolio.

JUDGE WALLEY: Very well. I'll mark that as ALJ No. 2 on motion for continuance.

> (the above-described document was marked as ALJ Exhibit No. 2 for identification and received in evidence.)

JUDGE WALLEY: May I have from Mr. Kosciuk the affidavit transmittal hand delivered dated September 4, 1987 in which there is an affidavit that speaks for itself. I'm going to admit that into evidence. I assume that is signed by Judith Atkinson, but tell you that I cannot read the signature. That's going to be ALJ No. 3.

(the above-described document was marked as ALJ Exhibit No. 3 for identification and received in evidence.)

JUDGE WALLEY: Now, our records show that —

MR. KOSCIUK: Your Honor, if I might offer as ALJ No. 4 correspondence from Mr. Robert Leininger of our firm dated July 16, '87 to Dunlop, Morel, M-o-r-e-l and Associates acknowledging hand delivery of the file to our office on July 13, 1987.

JUDGE WALLEY: Very well. This will be marked as ALJ No.4.

(The above-described document was marked as ALJ Exhibit No. 4 for identification and received in evidence.)

MR. KOSCIUK: And I won't address the issue of the correspondence exchange between Mr. Allen and Ms. Atkinson, because I believe that is addressed firsthand by Mr. Atkinson in ALJ 3, her affidavit.

JUDGE WALLEY: Is there anything further before I go to my file and identify the —

MR. KOSCIUK: I would also point out for the record, Your Honor, that the — when we obtained a copy of the Department's file last week, it reflected that notice adding LIGA and setting the trial date was mailed to LIGA directly, but when we checked the address of LIGA, we find that it's the same address as to Mr. Atkinson. So I don't think there's any question here that LIGA ever received any direct notice of this hearing.

JUDGE WALLEY: And I'm traveling under the law that if a client has an attorney and the attorney has notice, the law imputes that knowledge to the client, because the lawyer is an official representative of the client in the courtroom. So I will assume that if Ms. Atkinson, as the attorney for LIGA received it, the client had notice.

Now, let the record show that according to —

MR. ALLEN: Your Honor, if I may interrupt you. You asked for all correspondence that I have from that firm.

JUDGE WALLEY: All right. Excuse me.

MR. ALLEN: I have additional correspondence which I just recall receiving. This letter is in regard, I believe, to a complimentary copy that I sent LIGA in respect to the motion to add LIGA originally some time ago in this particular litigation.

JUDGE WALLEY: All right. Let the record show that ALJ No. 5 is a letter from Mr. Harry J. Guglielmo dated April 30, 1987, addressed to Mr. David B. Allen. That will be identified as ALJ No. 5.

(The above-decribed document was marked as ALJ Exhibit No. 5 for

identification and received in evidence.)

JUDGE WALLEY: Why don't you look through for further if you have any. I'm going to observe that the record show that an order adding Louisiana Insurance Guaranty Association is a party respondent, and notice of hearing was issued by the Office of Administrative Law Judges in Metairie, Louisiana on the 13th day of July, 1987, and that the service sheet attached thereto shows that Judith R. Atkinson, Esq., the law firm identified, Matthew, Atkinson, Guglielmo and Marks and Day of Baton Rouge, Posts Office Box 3177, Baton Rouge, Louisiana 70821 was mailed as of that date by regular mail.

Now, I point that out because I do not consider that a legal summons, but it's a process by which we advise people we're dealing with their business, and make them aware of what's going on. That's regular mail. I do not attempt to hold LIGA or Ms. Atkinson responsible, because I have no return receipt. I'm not going to make a determination as to whether these other documents convince me that it was not received. That particular thing is not addressed in the motion or in the affidavit, as I recall it. But I do want the record to show that this has been done.

Is there anything further that you have that you need?

MR. ALLEN: Your Honor, it's not a letter to Judith Atkinson, but it is a carbon copy of a letter to your office of April 28, 1987 on my stationery, which you should probably have in your file, which shows a carbon copy of the motion adding — requesting the adding of the Guaranty Association being sent to the Guaranty Association P. O. Box 3177, Baton Rouge, Louisiana 70821.

JUDGE WALLELY: What date did you have there?

MR. ALLEN: That's April 28, 1987, a letter to Your Honor.

JUDGE WALLEY: I have the original in my file.

MR. ALLEN: At that point, I had no idea that Mrs. Atkinson was going to be involved in this particular litigation, but nevertheless, the same P.O. Box appeared, which I can only assume means that the Guaranty Association must list the P.O. Box as — that firm as their mailing address.

MR. KOSCIUK: I believe that's incorrect. Your Honor, but I believe that the letter that was introduced will reflect that the address that appears on the bottom of Mr. Allen's letter is Mr. Atkinson's address, and not LIGA's address, be that as it may.

JUDGE WALLEY: Yeah, I have that. Now, with the information that I have in my file with the information that's been offered, I'm going to advise counsel for LIGA that you are not required to sit here. You may if you wish and audit this. I'm traveling on the basis though, and I'm making every legal effort I can to validate Claimant's procedures to establish his entitlement to benefits.

The problem that you have advanced are not questioned, but those are legal questions, the facts determining their existence is not really relevant to facts that are relevant to injury. We're getting to the liability for the benefits to be paid for that injury now, and it's a totally and different ball game, if I might use that terminology. So with that, we are now ready to proceed to develop our case, though we're going to take a five minute recess.

I'm going to ask my able assistant to make copies of these things, and deliver them to their respective counsel. Would you do that?

(Whereupon, a brief recess was taken.)

MR. ALLEN: Your Honor, at this time we would call Neil Abbott to the stand.

JUDGE WALLEY: Mr. Abbott, come around and have a seat.

Whereupon,

NEIL R. ABBOTT, JR.

having been first duly sworn, was called as a witness herein, and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ALLEN:

Q Please state your name and address for the record?

A My name is Neil L. Abbott, Jr. at 412 Hibernia Place in Houma, Louisiana.

Q Please speak up, because this reporter over here has to hear what you're saying. Could you give us your educational background, please?

A I graduated from high school and previously attending University — Nicholls State University.

Q When did you graduate from high school?

A 1975.

Q And you're presently attending Nicholls State?

A Yes, sir.

Q Okay. Are you married?

A Yes, sir.

Q Excuse me?

A I have three children.

Q And what's the oldest and youngest ages?

A The oldest is six and the youngest is five months.

Q Okay. Can you give this Court — well, I understand that at the time of your accident, you were employed by Universal Iron Works; is that correct?

A Yes, sir.

Q Could you give this Court a brief background of what your employment history was from the point of graduating from high school until the time you went to work for Universal?

A At the point of graduation, I had a summer job working at a helicopter hangar at Houma Aviation.

Q What did you do there?

A I was refueling airplanes and cleaning. I worked — I've had a job at Delta Iron Works as a tacker, and worked

there for two and a half years.

Q A tacker — describe the duties of a tacker.

A I was a welding helper. I worked with a ship fitter. I worked my way up to a welder and quit Delta to attend Nicholls in January of 1978. I went for one semester.

After that semester, I got a job as a welder for Hopskill, and worked there until August of 1978. Then I was employed by Universal Iron Works at that time.

Q Okay. Other than your working at the helicopter service and your one semester at Nicholls, you have pretty much worked in shipyards; is that correct?

A Yes, sir.

Q Okay. Your work with Universal, where was that being done?

A In Houma.

Q And where at in Houma?

A Underneath the Prospect Street Bridge, off the Intercoastal Canal.

JUDGE WALLEY: Speak loudly and distinctly so that she can pick up what you say.

BY MR. ALLEN:

Q Talk to her, not to me, that way you can — look at me, though. Make sure your voice projects to her, okay?

What type of work was being done at the Universal Yard while you were working there?

A I was employed in the new construction shed when I first hired on, welding — building the new boars, new vessels.

Q And do you remember the day of your accident, the date?

A January 11, 1983.

Q Describe for the Court what you were doing on the day on this accident?

A We were taking down an airplane tire off the side of a boat which we had installed as a bumper system.

Q Was this boat in the water?

A Yes, sir. It was tied up at the dock.

Q Was it a new construction?

A It was a repair.

Q And it had an airplane tire on it. Could you explaint to the Court what these are used for?

A For bumper systems on offshore platforms to protect the hull.

Q It's hanging over the side of the boat there; is that correct?

A They were attached all the way around the outside of the hole.

Q Okay. And what water was the boat in at the time of your accident?

A Intercoastal Canal.

Q Okay. So the boat was in the Intercoastal Canal then?

A Yes, sir.

Q And the Intercoastal Canal ran along one side of the Universal Yard?

A Universal had a bulkhead all along the Intercoastal.

Q Okay. And the work that you've been doing at Universal consisted of strictly working on new vessels?

A No, sir. They had dry docks where they did repair work. Very often they needed hands, extra help, overtime or just extra hands to do the repair work, get it out.

Q At the time of your accident in January of 1983, were you doing strictly welding work?

A No. We did whatever was asked for us. We did whatever you were told. It was a roustabaout type job.

Q Okay. Did you have to do any carrying of any kind with any objects?

A They had scaffold boards. You had to manhandle the props that were taken off the boats, shafts, the hanging of the tires around.

Q Okay. What about with regard to your doing the tacking, fitting and welding work? Describe for the Court what you had to do in regard to positioning while doing this welding?

A It was very difficult positioning in a lot of cases. A lot of climbing in and out of manholes.

Q Were you on your feet a good deal of the day?

A Most of the time.

Q And did you have to assume awkwark positions at times to get into the areas where you needed to do the welding on these vessels?

A Yes, sir.

Q Okay. Why don't you — we've established at the time of your accident you were on a vessel that's in the yard for repair or alteratioin, and the vessel is in the intercoastal along the bulkhead at the Universal Yard. Describe for the Court what happened at the time of your accident?

A We were told to remove one of the airplane tires and put a longer chain on it to put it in line with the rest of them to align them uniform. I stood on the bottom row of tires. Another man stood on the opposite side of the tire to be removed.

A rope was tied to the tire to be removed, and passed up to the bulwarks, and then down to the bank where another man pulled on the slack so we could undo the shackles. To give it slack, we had to stand on the bottom of the tires and hold with one hand the attached tire, and with the other hand lift up the tire to be removed, to hold

slack in it to undo the shackles . At that time, that's when my back popped.

Q There'a two rows of tires, then, on this vessel?

A In the front of the hull.

Q And you were standing on the bottom row and pushing up on the top tire then?

A We were picking it up.

Q Okay, picking it up. and you say your back popped?

A Yes, sir.

Q Did you actually feel it pop?

A Yes, sir.

Q Had you ever had any problem with your back before this day?

A No, sir.

Q Okay. One thing that I — well, let's continue. Did you have any problems with your back after it popped that day?

A Yes. That happened early in the morning, around 7:00, 7:30. We have a break at 9:30, and by that time, I was in a position — I couldn't straighten out. I was bent over. That's when my boss told me they were going to bring me to the doctor and get checked out. If nothing else, precautionary measures.

Q To regress a bit, while — at the time of your accident, what were your wages?

A $9.00 an hour.

Q And how many hours a week were you working?

A I believe we were scheduled around 40, 45 hours a week. At that time, though, you worked whatever they wanted you.

Q Anything over 40 hours a week would have been time and a half?

A Yes, sir.

Q I'm going to hand you a document, or a copy of a document. See if you can identify that for me.

(Handing document to witness.)

A Yes, sir. That's a check stub.

Q Excuse me?

A My last check that I received.

Q And that's from Universal Iron?

A Yes, sir.

Q Okay. And this would have been for the last week that you worked with Universal in January of '86 — or '83, excuse me.

A Yes, sir.

MR. ALLEN: In connection with the witness' testimony, I would offer and introduce this particular check stub as Claimant Exhibit No. 2. And while I'm at it, Your Honor, I also have an entire copy of all the medical records that he has had for treatment with Houma Orthopedic Clinic. I'd offer that as Claimant Exhibit No. 1.

JUDGE WALLEY: Very well.

(The above-described documents were marked as Claimant's Exhibit Nos. 1 and 2 for identification, and received in evidence.)

BY MR. ALLEN:

Q I also have two other wage documents. See if you can identify this first one for me.

A My W-2 form for 1983.

Q Okay. And is that for employment with Universal iron?

A Yes, sir.

Q And see if you can identify —

MR. ALLEN: I'll mark the 1983 W-2 form as Claimant's Exhibit 3.

(The above-described document was marked as Claimant's Exhibit No. 3 for identification and received in evidence.)

A It's a W-2 form for 1982, wages for Universal Iron Works.

MR. ALLEN: Okay. I'll mark that as Claimant Exhibit No. 4.

(The above-described document was marked as Claimant's Exhibit No. 4 for identification and received in evidence.)

BY MR. ALLEN:

Q So the day of your accident, you sought medical attention for your back; is that correct?

A Yes, sir.

Q And who did you see?

A Dr. Matherne in -- well, he was a company doctor.

Q Is he a general practitioner?

A I believe so.

Q And how long did you see Dr. Matherne?

A A week and a half, approximately.

Q Is Dr. Bruce Guidry also a partner with Dr. Matherne?

A I believe so.

Q Okay. And did your back condition get better while you were Dr. Matherne or Dr. Guidry?

A There was a sharp pain in my back. I was able to straighten up after that time period, but there was still a stabbing pain in my back.

Q So you had some improvement in that you could straighten up, but you were still having pain; is that correct?

A Yes, sir.

Q Did Dr. Matherne or Dr. Guidry refer you to another physician for treatment?

A Yes, sir. They said that after that time period that they were informed to seek a professional in the back area, orthopedic.

Q All right. Who did he refer you to?

A Landry — Dr. Landry and Gary Guidry.

Q The whole Houma Orthopedic Clinic?

A Yes, sir.

Q Are they orthopedists?

A Yes, sir.

Q And there were three doctors in that clinic at the time?

A Correct.

Q Did you see one particular doctor, or did you see them all?

A I saw — it was various different doctors. Whoever was available.

Q But all in the same clinic; is that correct?

A Yes, sir.

Q What did they tell you was wrong with your back when you first went to see them?

A The CAT scan showed that there was a bulge in the lower back lumbar.

Q So you eventually had a CAT scan done of your lower back?

A Yes, sir.

Q And they indicated that you had a bulge in your lower back?

A Correct.

Q Were any other tests done which required you to be hospitalized?

A Yes, sir. I had the —

Q A myelogram?

A Yes, sir, a myelogram test done that hospitalized me where they shoot the dye in the back.

Q And did the doctors tell you what the results of that test were?

A That confimed the CAT scan, that there was herniated disks in the lower back.

Q Did Dr. Matherne take you off work when you first went to see him?

A Yes, sir.

Q And did Dr. — the Houma Orthopedic Clinic, the doctors there continue to keep you off of work?

A Yes, sir.

Q After the myelogram was performed, what treatment did they recommend for you?

A The therapy at their office was hot pads and message on the back, the ultrasonic heat.

Q What kind of problems were you having besides the lower back pain? Were there any other difficulties that you were experiencing?

A No, sir.

Q Were you having any problems with your legs?

A I had injuries playing ball.

Q In high school, was that right?

A Yes, sir.

Q But did you have any problems with your legs while you were having the back pain while you were being treated at the Houma Orthopedic Clinic?

A Not really, no.

Q Okay. Did you ultimately get released by the Houma Orthopedic Clinic?

A Yes, Sir. They told me they couldn't do any — be of any further help to me. They suggested that I go for rehabilitation.

Q Was there ever a suggestion for some type of injection to be done in your lower back?

Yes, sir. Dr. Guidry asked — gave me information about the injection, and I read the pamphlet that he gave me. But I felt there wasn't enough research done on it for me to be a candidate for it. Also, Dr. Gary — Dexter Gary —

Q So there's a Gary Guidry and a Dexter Gary now?

A And a Dexter Gary. Dexter Gary is a doctor I put a lot of faith into. He suggested, since I wasn't having a lot of leg pain caused from my back, that I leave it alone and let time try to repair itself.

Q Is that what you have done?

A Yes, sir.

Q And I think you indicated that at one time they released you to return as necessary; is that correct?

A Yes, sir.

Q And they also recommended that you seek vocational rehabilitation?

A Correct.

Q Did the doctor specifically tell you that you shouldn't go back to work as a welder in a shipyard?

A He told me I wouldn't be able to return to the occupation I was.

Q And he was aware of what you occupation was?

A Yes, sir.

Q Okay. In regard to vocational rehabilitation, have you seen Jennifer Palmer?

A Yes, sir.

Q And what help did she give you in regard to vocational rehabilitation?

A Guidance to pick a field that I could handle with my disabilities. Tests showed that I was capable of learning, going back to college.

Q So you took some tests Jennifer Palmer gave you?

A Yes, sir.

Q And did you all, between you and she, ultimately decide what you wanted to do in regard to rehabilitation?

A Yes, sir.

Q And I take it that's to go to Nicholls; is that correct?

A Right.

Q What is your area, or what is your major at Nicholls?

A It's medical technology.

Q And when did you start?

A I started in the fall of 1985.

Q And what is your present classification at Nicholls?

A I'm a junior.

Q And are you attending at the present time?

A Yes, sir.

Q From reviewing the records — the medical records which have been previously introduced at trial as Claimant's Exhibit No. 1, I see where the Houma Orthopedic Clinic indicates that after they released you to return as necessary, you were involved in a car accident?

A Yes, sir.

Q Can you describe to the Court what, if any injuries, you receive in that car accident?

Q Can you describe to the Court what, if any injuries, you receive in that car accident?

A I had a back flare up, it flared it up. I had the tests. I went back to the doctors and had tests done to see it there was any further damage, but from the doctor report there was no further injury to the back. It just aggravated it.

Q When the doctor released you to return as necessary but before this car accident, were you pain free in regard to your lower back?

A No, sir.

Q After this car accident, you said you had a flare up?

A Yes.

Q What do you mean by that?

A Pulled muscle type.

Q The pain increased?

A For a while, temporary.

Q Did it eventually return to the level it was before the car accident?

A Yes, sir.

Q What did doctor — or the Houma Orthopedic Clinic do after the car accident in regard to treatment on you? You say you had some tests to see if it was the same as before?

A Yes, sir. I had the CAT scan done.

Q Okay. So they repeated the CAT scan?

A Yes, sir.

Q And did the doctors indicate to you whether there was any change from the previous CAT scan done?

A No. There was no change.

Q Okay. Do you have any idea what size bulges you had in your lower back? Did the doctors ever tell you?

A They did, but I — I know there's two.

Q Two levels?

A Yes.

Q Have you, to date as we sit here today, ever been pain free since the doctors have released you, in regard to your lower back?

A No, sir.

Q What is your present condition? How is it that you feel — I'll start there. How do you feel on a daily basis in regard to your lower back?

A I have to limit myself to exerting myself too much. Anything that I do usually aggravates my back.

Q What do you mean by anything that you do?

A Walking, standing in one place too long, driving a

car for any length of time. It does aggravate it to go out in the yard and cut the grass. I usually soak in the tub that night.

Q So you're saying if you increase your physical activity level, your back pain or back problems increase as well?

A Yes, sir.

Q Okay. Since this accident occurred, have you received compensation benefits?

A Excuse me?

Q Have you ever received compensation benefits as a result of this accident at Universal?

A Yes, sir. up until last September 15th of 1986.

Q That's when compensation benefits stopped?

A Yes.

Q And what rate of compensation benefits were you receiving? How much did you get per week?

A $286.67.

Q Okay. Was there a time when someone from Universal told you that their compensation insurance carrier would no longer be able to pay the benefits?

A Yes, sir. I was informed the insurance company was going bankrupt.

Q And who informed you of this?

A The insurance adjustor which I talked to about paying compensation while I attended college and got rehabilitated. When I was contacted by him again about a week later, he informed me that the insurance company was filing for bankruptcy.

Q And at that point, did you continue receiving benefits?

A They changed. I started collecting from Universal. The Employer picked up the compensation payments.

Q And who were you dealing with in regard to getting compensation payments from Universal?

A Mr. Bob Hill with Terrebonne Bank and Trust.

Q Do you know what relationship — I'm asking from your own knowledge. If you don't know, that's fine. Do you know what relationship Terrebonne Bank had with Universal?

A No, I don't.

Q But you were dealing with —

JUDGE WALLEY: Speak up now, Mr. Abbott. You can talk a little louder. It doesn't hurt you.

BY MR. ALLEN:

Q You don't have any idea what Bob Hill's relationship with Terrebonne Bank was with Universal?

A Not really.

Q But you called him to make sure you were going to get benefits; is that correct?

A Yes, sir.

Q And did you talk with him periodicaly?

A Quite often, after Universal closed its doors, I'd have to call his office to get the checks.

Q Okay. And as of September 15, 1986, you stopped receiving checks from Universal; is that correct?

A Yes, sir.

Q Okay. I have two other documents that I would like to show you and see if you can identify them for me.

A This is a notice of liquidation for Western Preferred Casualty Company.

Q Okay. That is the first document. What's the —

MR. ALLEN: I want to identify it as Claimant's Exhibit No. 5.

(the above-described document was marked as Claimant's Exhibit No. 5 for identification, and received in evidence.)

A This is a form I had to fill out to proof of claim.

Q Did you and I sit down and fill that out together?

A Yes, sir.

MR ALLEN: I'll identify that and offer it as Claimant Exhibit No. 6

(The above-described document was marked as Claimant's Exhibit No. 6 for identification, and received in evidence.)

MR. ALLEN: Your Honor, I would tender the witness at this time to any questions that the Court –

JUDGE WALLEY: No cross examination. I would ask you to ask him if the records do not support this, date some of these things. Do you have anything from the Department of Labor that reflects the benefits that he had received?

MR. ALLEN: Yes, sir, I do.

BY MR. ALLEN:

Q Mr. Abbott, do you have any forms from the Department of Labor indicationg what benefits that you have received?

A Not that I know of. No, sir.

MR. ALLEN: I don't either. Your Honor, if I could make a statement for the record as well. We attempted to obtain the wage records from Mr. Abbott from Universal, but they indicated to me that due to the liquidation of the corporation, that it would be next to impossible to locate these particular records. That's the reason we've introduced the records that we have. But I don't have any statement from the Department of Labor as to what benefits he has received.

JUDGE WALLEY: Have you made any attempts to obtain a Form 208 from the Department of Labaor that should have a continuing record of all sums paid by the people who have some obligation, or who have assumed some obligation?

MR. ALLEN: Excuse me, Your Honor.

JUDGE WALLEY: We'll go off the record momentarily.

(whereupon, a brief recess was taken.)

JUDGE WALLEY: Let's go back on the record. Let the record show that counsel has advised that he does not have a Form 208. At this time I'm going to ask if he has any other source, recorded information as to how much benefits and who paid these benefits that are now of record for the Claimant.

MR. ALLEN: Your Honor, I have a letter from American Excess Underwriters addressed to the Department of Labor dated January 8, 1985 indicating as of that date the total amount of benefits paid as well as total medical paid. From that date forward, I have nothing which would reflect —

JUDGE WALLEY: Well, you have mentioned today that sometime in September of 1986, I recall, or something being paid. but it was at that time stopped, and he has received nothing since that time.

MR. ALLEN: Correct.

JUDGE WALLEY: I dont't care for that. That's some information. But I'll hold it until you do what I'm now going to instruct you to do.

MR. ALLEN: Yes, sir.

JUDGE WALLEY: It is absolutely necessary to know what has been paid, since he has received benefits, to know what medical expenses that are outstanding that's causally related to this cause.

MR. ALLEN: I can stipulate for the record, Your Honor, we have no outstanding medical expenses.

JUDGE WALLEY: Well, do you know, or can you give the record evidence to support the fact that what has been paid by some responsible Employer or someone who has assumed responsibility for the Employer?

MR. ALLEN: I think I can establish through Mr. Abbott that he has paid no medical expenses himself, and that all medical expenses have been paid.

BY MR. ALLEN:

Q Mr. Abbott, have you paid any medical expenses in regard to any treatment that you received for your lower back injury from July — June — excuse me, January 11, 1983?

A No, sir. I haven't.

Q And to your knowledge, are all medical expenses paid?

A Yes, sir.

JUDGE WALLEY: Very well. I want to put to rest the medical, current medical. I need to know, then, all benefits that have been paid and by whom they were paid.

I think you can obtain that information from the Office of the Deputy Commissioner here in New Orleans, servicing the Houma area and the Houma employees. The Labor Department's Form 208 is usually the one that's provided to me as a record of the different sums paid at different levels, and also the codes when they were stopped, and if there's any known reason, the reason is stated on that form why they were stopped.

BY MR. ALLEN:

Q Mr. Abbott, since the day of your accident up until September 15, 1986, have you received what was compensation and weekly benefits on a regular basis? Have you been paid for all weeks?

A Yes, sir. Up through that date.

Q So as of September 15, 1986 you were owed no Workman's Compensation — '85 — no, '86, excuse me — you were owed no Workman's Compensation benefits?

A Correct.

Q Nothing remains outstanding. It's only from that date forward that you're asserting that you're entitled to benefits; is that correct?

A Yes, sir.

JUDGE WALLEY: Are you saying '85 or '86?

MR. ALLEN: '86.

JUDGE WALLEY: All right.

BY MR. ALLEN:

Q As of September 15, 1986; is that correct, Mr. Abbott?

A Yes, sir.

MR. ALLEN: Your Honor, I will obtain the Labor Department Form 206.

JUDGE WALLEY: Do you take the time, or will you take the time to find out at what rate he was being paid, the compensation rate?

MR. ALLEN: I've already asked him, Your Honor.

BY MR. ALLEN:

Q Mr. Abbott, what were you being paid per week in compensation Benefits?

A I was being paid $286.67.

JUDGE WALLEY: 286.67?

MR. ALLEN: 7.

JUDGE WALLEY: 67.

BY MR. ALLEN:

Q That's per week, Mr. Abbott?

A Yes, sir. Per week.

JUDGE WALLEY: 280 —

THE WITNESS: 286.67.

JUDGE WALLEY: 67 per week?

THE WITNESS: Yes, sir.

JUDGE WALLEY: All right. And you have been paid that through September 15, 1986?

THE WITNESS: Yes, sir.

JUDGE WALLEY: All right. And all medical has been paid through that date, or up to date, all medical. You have had no subsequent?

BY MR. ALLEN:

Q Mr. Abbott, since September 16th — or 15th, 1986, have you had to seek medical attention because of your back condition?

A No, I haven't. No, sir.

Q Does that mean that you haven't had any problems with your back, or you just didn't need to go to the doctor?

A I just felt that there wasn't anything else they could do. I put up with the discomfort.

Q You knew what your condition was?

A Yes, sir.

JUDGE WALLEY: Very well. And you have nothing further, then, from this witness?

MR. ALLEN: Not from this witness, Your Honor.

JUDGE WALLEY: At this point, I'm going to request that you make an effort to obtain from the Department of Labor the Form 208 dealing with this claim.

MR. ALLEN: I will immediately, Your Honor.

JUDGE WALLEY: And obtain a copy of that form me. And I'll keep the record open for a period of time to allow that to become evidentiary. We will address further things as we need them. You need to tell me, were these benefits up through September 15, 1986 paid for a temporary total, or for what they determined to be a permanent total of disability?

THE WITNESS: I'm not certain.

MR. ALLEN: Your Honor, I believe it's my assumption that they were being paid under temporary total disability. He has a partial permanent disability. He's not totally disabled at the present time, but is unable to return to his former —

JUDGE WALLEY: But through September 15th, he was considered temporary total?

MR. ALLEN: It's my understanding from looking at the medical records, yes, Your Honor.

JUDGE WALLEY: All right. Now, from the medical records, are you able to say what date he reached maximum medical improvement to become partially

disabled? Let's not do that this morning. Just keep that as a thing I'm going to ask you to do, and I'm going to give you ten days to do that in, at the same time you get your 208, so we can move on to something else.

MR. ALLEN: Yes, sir.

JUDGE WALLEY: If there's no further — I have nothing further that I feel right now needs to be established by this gentleman. We will ask him to stand aside. We'll take a brief recess, five minutes, and then we'll take up the next witness.

MR. ALLEN: Thank you, Your Honor.

(Witness excused.)

(Whereupon, there was a brief recess taken.)

Whereupon,

JENNIFER PALMER

having been first duly sworn, was called as a witness herein, and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ALLEN:

Q Would you please state your name and business address for the record?

A Jennifer Palmer, 4500 Clearview Parkway, Suite 200 in Metairie, and the zip is 7006.

Q What is your occupation, Ms. Palmer?

A I'm a vocational rehabilitation counselor.

Q And could you give us a brief description of your educational background?

A Yes. I have a Master's Degree in Rehabilitation Counseling, which I received in 1976. I've been in the field for approximately 15 years. I'm also certified by the U.S. Department of Labor, Office of Workers Compensation, to provide services to injured workers.

Q And have you qualified as an expert in the field of vocational rehabilitation in courts of law in the State of Louisiana?

A Yes, I have.

Q Would this be both state and federal court?

A State and federal, yes, sir.

Q And would it by a court of Administrative Law Judge in a proceeding such as this?

A Yes, sir.

MR. ALLEN: Your Honor, at this time I would tender Mrs. Palmer as an expert in the field of vocational rehabilitation.

JUDGE WALLEY: I will not challenge that. I'll accept her. Proceed.

BY MR. ALLEN:

Q Mrs. Palmer, have you had occasion in your professional capacity to meet Neil Abbott?

A Yes, I have.

Q And when was the first occasion you had to meet with him?

A Actually, I first evaluated Mr. Abbott when I was with another company, and they still have some of those records. I would have the initial time that I met with him.

Q What company was that?

A It was Crawford Rehabilitation Services.

Q And do you know who they were working for?

A I was originally hired by Universal Services uncer — it's called — let's see, American Excess Underwriters.

Q If you could describe the process which you did — you went through in regard to Mr. Abbott in attempting to help him rehabilitate himself in regard to a future vocation?

A All right. What I did was meet with Mr. Abbott to do the initial evaluation, and we also did vocational testing to see what his abilities and skills were, and the potential that he would have for retraining and rehabilitation. He tested very high on all the vocational tests, and we sat down with American Excess Underwriters and also their — the adjusting company, which was F.A. Richard, and decided on a plan of action with Mr. Abbott.

Q Have you had the opportunity — excuse me —, op-

portunity to either talk with or examine the medical records or talk with the records — obviously not the records, but the —

A Yes, I did. I was provided with the medical records, and also received the OWCP 5, which is the work restriction form from Dr. Gary.

Q All right. Were you aware of what his occupation was at the time of his accident?

A Yes. He was working for Universal, I believe as a welder.

Q And due to the restrictions as given to you by the doctor in the OWCP Form 5, were you of the opinion that he could return or not return to that particular occupation?

A He definitely could not return to that occupation.

Q Okay. So it was y'all's plan, then, to seek some other field or vocation for him?

A Right. The doctor had recommended sedentary work.

Q I interrupted you. If you could continue with what you were doing in regard to the vocational rehabilitation efforts?

A Well, after we decided on the plan, we just proceeded with enrolling him in college. At that point the Department of Labor became more actively involved through the rehabilitation specialist there, and the program was funded through the Department of Labor, and Mr. Abbott started college, I believe, in September of 1985.

Q And have you monitored his progress through that time to the present, or until when?

A Yes. I monitor his progress and report to Mr. Bohlken at Department of Labor.

Q Okay. And how is he doing in regard to his activities — academic activities at Nicholls?

A At the present, the most recent report I have from the Department, and in talking with Neil, of course, he's doing well, in spite of some difficulties. His grade point average over all is 2.53, and that meets the Department's requirements for continuing to fund the program.

Q What problems are you speaking of, Mrs. Palmer?

A Well, one of the problems initially, of course, in reenrolling someone in college is that he had been out of school for so long, and that's an adjustment. He also was having some physical problems sitting in a class all day, and then also walking on the campus. You have to move quickly from class to class, and initially that was a problem. But he stuck with it, and maintained his grades.

He was having some difficulty with physics. But again, he managed to overcome those problems. He's been passing his courses and doing well.

Q Has the — in your conversations with Mr. Abbott, has the fact that his compensation benefits have been terminated, for whatever reason, impacted his vocational rehabilitation effort?

A Yes, it certainly has.

Q And could you elaborate on that, please?

A Well, without any other source of income, he's got a family to support. And of course, without any other compensation benefits coming in, he's had to rely on his family lending him money, and trying to get money from other sources, friends and family. It's been aggravating to him. He's had to worry about where his next check is coming from, and he hasn't had any income.

Of course, that — I've had to do a lot of counseling with him this past year to try to lift his spirits and keep him motivated. He is motivated already, but he just needs a little — he gets angry at his situation, and that affects how he studies. It affects his concentration. So it's been a real rough year for him.

MR. ALLEN: I think that's all the questions I have. I tender the witness. Your Honor.

JUDGE WALLEY: Are you going to have a report from this lady?

MR. ALLEN: Your Honor, I haven't retained her. I have the reports that she has in her file that I would be happy to offer.

JUDGE WALLEY: No. I just wondered if you had anything that you were going to use her as a vehicle to offer. What she said is complete.

MR. ALLEN: Yes, I agree. It would just be duplicative.

JUDGE WALLEY: I have no questions. I know of nothing that I can say to enlarge this. You may stand aside.

THE WITNESS: Thank you.

(Witness excused.)

MR. ALLEN: And Your Honor, that concludes the live testimony. I have some additional exhibits.

JUDGE WALLEY: All right. Identify them.

MR. ALLEN: The deposition of Ginger Hellier, H-e-l-l-i-e-r, which identifies the policy — or Western Preferred as the policy applicable to this particular injury Mr. Abbott suffered. I believe that is Claimant Exhibit No. 7. As Claimant Exhibit B we would identify the Western Preferred policy in question.

And finally, the deposition of Robert J. Hill, who is the Senior Vice President of Terrebonne Bank and Trust, which has assumed control — which assumed control of Universal pursuant to debts owed it, owed the bank. He establishes the fact that Universal is now liquidated and has no assets, and I would identify that as Claimant Exhibit No. 9.

(the above-described document was marked as Claimant's Exhibit Nos. 7 through 9 respectively for identification, and received in evidence.)

JUDGE WALLEY: Is the liqudation under Chapter 11?

MR. ALLEN: It was not a bankruptcy liquidation. It was just a — they sold all their assets to retire what debt they could. The corporation has been liquidated with the Secretary of State.

JUDGE WALLEY: Okay. Very well. Let the record show at this time then that the Claimant has offered exhibits on behalf of the witnesses 1 through 9, which have been received into evidence, and I will take custody of those exhibits. Further, it's been discussed that additional information is going to be obtained, and Claimant will be allowed a period of ten days within which to obtain from the Department of Labor or other official sources the total amount of benefits that have been paid. That's usually reflected in the Form 208, and if there's any need for further definitive information from the referee or trustee of the bank that liquidated the assets of Universal Iron?

MR. ALLEN: That's in that deposition that we took, Your Honor. He was a senior vice president and managed the liquidation. I have attached copies of the act of sale, where all assets were sold as well as attached the order of liquidatiion from the Secretary of State for Universal Iron Works, the corporation.

JUDGE WALLEY: Very good. So I'm going to allow ten days for the receipt of such information as we have discussed relative to his benefits. I'll ask counsel now if you pursue — if you want to follow up on a brief to be filed with the Court based on the information you have, the relevant dates, what's been paid, what you claim is owed. the Department of Labor has been handling rehabilitation, I understand, from the testimony?

MR. ALLEN: Yes, sir.

JUDGE WALLEY: Let the record reflect that I consider LIGA is a party, was not here in sufficient time to require them to participate, but to make available to them the opportunity to audit this proceeding, at which I would resist personally if I were involved, and the Court's deci-

sion is challenged. I expect to address it briefly in the order.

They are presently and remain in court. I have not discharged them. If there is further need to have them, I will only be required to notice them that this next date has been set. I consider them having legal notice now by their appearance of them being identified as a party. I have refused at this time, and I have advised counsel that he should make a formal request if he decided to go to another court where that matter could be addressed.

With that, I'm going to say the, and with my notes, that we have 30 days within which to provide post hearing evidence and file a brief. Do you have any questions, Counsel, that you need to ask?

MR. ALLEN: No, Your Honor. Could we go off the record a second?

JUDGE WALLEY: Yes. All right.

(Whereupon, there was a discussion had off the record.)

JUDGE WALLEY: Let the record show, before closing the record, Counsel presented to the Court a letter from David J. Norman, III, who comes to represent or speaks for Universal Iron Works?

MR. ALLEN: Yes, sir. He's with the office of Steve LaRussa, who is counsel of record in this matter.

JUDGE WALLEY: And in that they are advising that they waive their appearance at this hearing on this date on behalf of Universal Iron Works, Incorporated. I'm going to mark that ALJ No. —

MR. ALLEN: 6, I believe it is, Your Honor?

JUDGE WALLEY: I believe that's all. ALJ No. 6, and admit that into the file.

(The above-described document was marked as ALJ Exhibit No. 6 for identification, and was received in evidence.)

JUDGE WALLEY: If there's nothing further then, we'll return, and we'll announce that, with the provisos already stipulated into the record, the record will now be closed.

MR. ALLEN: Thank you, Your Honor.

(Whereupon, at 10:40 a.m., the hearing in the above-entitled matter was concluded.)

APPENDIX E

DEFAULTED PAYMENTS

Sec. 18. (a) In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, *within one year* after such default, make application to the deputy commissioner making the compensation order or a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 19, a deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. In case the payment is default is an installment of the award, the deputy commissioner may, in his discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred. In case such principal place of business or office or place where the injury occurred is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the United States District Court for the District of Columbia. Such supplementary order of the deputy commissioner shall be final, and the court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ or execution in the form used by the court in suits at common law in actions of assumpsit. No fee shall be required

for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. The court shall modify such judgment to conform to any later compensation order upon presentation of a certified copy thereof to the court.

(b) In cases where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in section 44, make payment from such fund upon any award made under this Act, and in addition, provide any necessary medical, surgical, and other treatment required by section 7 of the Act in any case of disability where there has been a default in furnishing medical treatment by reason of the insolvency of the employer. Such an employer shall be liable for payment into such fund of the amounts paid therefrom by the Secretary of Labor under this subsection; and for the purpose of enforcing this liability, the Secretary of Labor for the benefit of the fund shall be subrogated to all the rights of the person receiving such payment or benefits as against the employer and may be a proceeding in the name of the Secretary of Labor under section 18 or under subsection (c) of section 21 of this Act, or both, seek to recover the amount of the default or so much thereof as in the judgment of the Secretary is possible, or the Secretary may settle and compromise any such claim.

PROCEDURE IN RESPECT OF CLAIMS

Sec. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the

Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order reject the claim or make an award in respect of the claim.

(d) Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that

title. All powers, duties, and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Amendments of 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners.

(e) The order rejecting the claim or making the award (referred to in this Act as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

(f) An award of compensation for disability may be made after the death of an injured employee.

(g) At any time after a claim has been filed with him, the deputy commissioner may, with the approval of the Secretary, transfer such case to any other deputy commissioner for the purpose of making investigation, taking testimony, making physical examinations or taking such other necessary action therein as may be directed.

(h) An injured employee claiming or entitled to compensation shall submit to such physical examination by a medical officer of the United States or by a duly qualified physician designated or approved by the Secretary as the deputy commissioner may require. The place or places shall be reasonably convenient for the employee. Such physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation be payable for any period during which the employee may refuse to submit to examination.

PRESUMPTIONS

Sec. 20. In any proceding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

REVIEW OF COMPENSATION ORDER

Sec. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b)(1) There is hereby established a Benefits Review Board which shall be composed of *five* members appointed by the Secretary from among individuals who are expecially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. *The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.*

(2) For the purpose of carrying out its functions under this Act, *three* members of the Board shall constitute a quorum and official action can be taken only on

the affirmative vote of a least *three* members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the hearing examiner for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(5) Notwithstanding paragraphs (1) through (4), upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve on the Board temporarily, for not more than one year. The Board is authorized to delegate to panels of three members any or all of the powers which the Board may exercise. Each such panel shall have no more than one temporary member. Two members shall constitute a quorum of a panel. Official adjudicative action, may be taken only on the affirmative vote of at least two members of a panel. Any party aggrieved by a decision of a panel of the Board may, within thirty days after the date of entry of the decision, petition the entire permanent Board for review of the panels decision. Upon affirmative vote of the majority of the permanent members of the

Board, the petition shall be granted. The Board shall amend its Rules of Practice to conform with this paragraph. Temporary members, while serving as members of the Board, shall be compensated at the same rate of compensation as regular members.

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals *for the circuit in which the injury occurred*, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties and thereupon the Board sshall file in the court the record in the proceedings as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court insuch proceedings, may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irrepoarable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference therto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) If any employer or his officers or agents fails to comply with a compensation order making an award, that

has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(e) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18.